92-1265

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE B. SCHWAGER, et al.,
Petitioners,

v.

TEXAS COMMERCE BANK, N.A., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

BRUCE B. SCHWAGER BETTE R. SCHWAGER
2001 Holcombe, Apt. 806
Houston, Texas 77030
(713) 796-2540

Pro Se

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QUESTIONS PRESENTED

1. Were Petitioners denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed? Is the Texas Election Code Section 251.003 constitutional? Did the hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constitute lack of access to the court and an obstruction of justice?

2. Was Petitioner Bette R. Schwager deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 when she was not allowed to prosecute her claims and defend herself against the taking of her property?

3. Were Petitioners denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case when the court of appeals struck 43 of Appellants' 44 points of error for procedural defects?

4. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas? Were Petitioners denied the benefit of the final judgment entered in their favor on Oct. 14, 1986? (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Were

Petitioners denied their constitutional rights by the Texas courts assessing judgment against them without jurisdiction?

5. Were Petitioners denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court?

Note: *Schwager v. Texas Commerce Bank, N.A.*, 813 S.W.2d 225 (Tex. App.—Houston 1991) (per curiam). This case was stated in the U.S. Supreme Court Judicial Highlights November 1991, page ix West Supreme Court Reporter Vol. 112 November 1, 1991 No. 1.

PARTIES TO THE PROCEEDINGS

Pursuant to the Texas Rules of Appellate Procedure, Petitioners certify that the following is a complete list of the names of all parties:

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PETITION FOR WRIT OF CERTIORARI

PRAYER

Petitioners respectfully request that a Writ of Certiorari issue to review the Orders of the Texas Supreme Court in this case.

OPINIONS/ORDERS BELOW

The Order of the Texas Supreme Court, upon Petitioners **Motion for Rehearing**, was decided Oct. 28, 1992 (Appendix "C"). The Order of the Texas Supreme Court upon **Application For Leave To File Application For Writ Of Error** was entered Sept. 9, 1992 (Writ Denied). (Appendix "B"). The Opinion of the

Texas Court of Appeals was entered March 12, 1992. (Appendices "D" & "Y"). The Opinion of the 1st Court of Appeals was entered Feb. 24, 1992 (striking 42 of 44 Points of Error) (Appendix "V"). The Judgment of the Harris County District Court was entered on 12-8-89. (Appendix "O"). The judgment in Case #86-07376 was entered on Oct. 14, 1986 (Appendix "W."

JURISDICTION

The Order of the Texas Supreme Court overruling Petitioners' motion for rehearing was entered on 10/28/92. This Petition for Certiorari is within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. 28 U.S.C. § 2403(b) may be applicable. Issues presented in this petition have been previously submitted to the Texas 1st Court of Appeals and/or the Texas Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

The 5th and 14th Amendments to the U.S. Constitution, Art. 1 §§ 3, 13, 14 & 19, and Article 5 § 8 of the Texas Constitution. Texas Civil Practices & Remedy Code Ann. § 51.014(1) Vernon Supp. 1992. (Appendix "U"). Texas Election Code Title 15 Chapter 251 § 251.003. Appendix "S."

PRELIMINARY STATEMENT

The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of that choice and protect only the ones that by its own lights are necessary. *Fuentes v. Sherin*, 92 S. Ct. 1983, 1999 (1972).

Middle-class Americans who have been wrongfully denied their constitutional right of liberty and property are just as entitled to access to this Court as an habitual criminal. Middle-class Ameri-

cans of any color or creed who have been stripped of their dignity, liberty or property and forever precluded from owning and enjoying property are as devastated as a habitual criminal would be having to spend time incarcerated. *Neither case should be allowed to exist.* Petitioners pray that the U.S. Supreme Court *at least* review their Petition for Writ of Certiorari and issue an opinion.

This Petition for Writ of Certiorari is made to correct the **MANIFEST INJUSTICE** (Black's Law Dictionary, 5th Edition, pages 707 and 867) perpetrated on "Schwagers" by the courts of the State of Texas. Also, the Petition gives the U.S. Supreme Court the opportunity to show voters in Texas that it has the courage and conscience to reverse an unjust ruling (Sept. 9, 1992). Recent articles in the Houston Chronicle and Post have indicated that the Texas Supreme Court can be purchased by large campaign contributions from banks, insurance, and other large corporations. (Appendices "I," "J" & "K").

U.S. Supreme Court Justice Sandra Day O'Connor has stated that her home state of Arizona had changed from partisan selection to an appointment/merit election and that the quality of the judiciary had improved 100 percent. Justice O'Connor said that this change also solved the need for campaign contributions from attorneys. Appendix "K-3".

As one of the largest banks in the State of Texas, "TCB" is a respondent in this case and is represented by Baker & Botts, one of the largest defense law firms in Texas. A once-in-a-lifetime opportunity existed for the Texas Supreme Court to show the world that there is equal protection under the law for a citizen of the State of Texas regardless of their status.

In the letter from the Texas Supreme Court which was **NOT SIGNED** by any of the sitting Judges of this Court or any Judge for that matter, the notation was made "Writ Denied." (Appendix "B"). These two words destroyed the lives of two upright, long-term citizens of the State of Texas. No opinion was issued by the Texas Supreme Court to support its erroneous decision. The lack of a Judge's signature and an opinion to support "Writ Denied" tends to support the accusations made about the Texas Supreme Court's refusal to equitably dispense justice. Appendix "I".

It is evident from the actions of the Texas Supreme Court that it did not issue an opinion to support its ruling as there was not a just, fair, equitable and impartial argument to be made to support "Writ Denied." The court also violated its mandate to correct rulings that if left standing would constitute a serious departure from the established law or introduce a doctrine violative of fundamental principles. 1203 Texas Bar Journal, Dec. 1987.

It is incredible that the Texas Supreme Court has ruled that the lower courts have made errors but the "Schwagers" did not matter enough to have the judgment against them reversed or that the issues were not important to the jurisprudence of the State of Texas. Certainly, **JURISDICTION** is a **FUNDAMENTAL PRINCIPLE**.

The admission of error by the Texas Supreme Court, without a special opinion, will only create the problems similar to those created by the court's ruling in *Inpetco*. 32 STL 131-135 South Texas Law Review. **THE SANCTITY OF FINAL JUDGMENTS MUST BE PRESERVED.** Voters have the right to know if a judgment in their favor or against them is final or not. The final judgment issued in favor of "Schwagers" on Oct. 14, 1986, Case #86-07376 (Appendix "W", was ruled not final **SIX (6) YEARS LATER** by Justice Murray Cohen, First Court of Appeals on March 12, 1992. Appendix "Y-5".

The Texas Supreme Court's ruling has only had the effect of justifying trial court judge Don Wittig's statement prior to trial that he was *not* going to let the "Bank" lose the case. (Motion for Sanctions and Gag Order 1st Court of Appeals 8-22-91). This judge knowingly allowed perjury to be committed in his court, and allowed other wrongful acts as demonstrated by documents submitted in the First Court of Appeals and the Texas Supreme Court. The Supreme Court of Texas has also confirmed the action of Appellate Court Judge Murray Cohen who should have recused himself "sua sponte" as he was a personal friend of one of the parties to this action (H. Resnick). Further, Justice Cohen usurped the authority of the Texas Supreme Court and the State Legislature by deciding which Rules of Appellate Procedure are valid and which should be disregarded so as to deny Appellants their

constitutional right of appeal. (Ruling Feb. 24, 1992 and March 12, 1992). (Appendices "V" and "Y"). **These rulings struck 43 of Petitioners' 44 points of error for procedural defects.**

It was unconscionable for Judge Cohen to state in his opinion (Appendix "Y-3") that breach of fiduciary duty was not tried in Case #86-07376. The record clearly and irrefutably shows that breach of fiduciary duty was tried. The trial judge Michael O'Brien in Case #86-07376 stated that breach of fiduciary duty was tried. **At the trial of Cause #86-07376 on July 22, 1986 the trial judge, Michael O'Brien, stated the following: S.F. 102 "Again I think your argument here goes to that Breach of Fiduciary Duty Argument." S.F. 104. He's alleging you breached your fiduciary by the General Partner unilaterally changing the terms of the lease that exists between the two entities. Whether you had the power to do it is a legal interpretation for me based on the evidence."** The 1st Court of Appeals was required to review the pleadings and evidence in Case #86-07376 to determine if the judgment was final. *Fergurson v. Fergurson*, 338 S.W.2d 945, 946, 947 (Tex. 1960). This duty was clearly *shirked* by the 1st Court of Appeals and the Texas Supreme Court.[1]

STATEMENT OF THE CASE

This lawsuit involves a conspiracy between TCB and the Limited Partners of B.B.M.M., Ltd. to defraud the General Partner, Bruce B. Schwager of his 50% interest in the Partnership. Appendix "T."

These claims were made against TCB and the Limiteds in the TRO obtained on March 27, 1987 by Bruce B. Schwager. "Schwagers" were the true Plaintiffs in the case before the trial court in Case #87-14551 (consolidated case) as they were in Case #86-

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[1]Bruce Schwager was tried for breach of fiduciary duty allegedly committed in January of 1986 at the trial of Case #86-07376 in July of 1986. After all issues of law and fact were submitted, he was found ***not*** guilty. He was retried for this breach of fiduciary duty during the trial in November of 1989 (87-14551) and found guilty.

07376. Schwager was not only unable to obtain a judgment against TCB and the Limiteds, but sustained a judgment against them in favor of TCB for approximately $775,000 and in favor of the Limiteds for approximately $1,300,000. This was a reprehensible outrage based on the facts and law of this case which *were not* ruled on by the First Court of Appeals and the Texas Supreme Court. TCB had no standing to sue Schwager after it breached the contract by wrongfully accelerating the Promissory Note and the Limiteds breached the Partnership Agreement by not making payments as required in January 1987. Appendices "L-3" & "E-3." At the hearing held on March 9, 1987, the Limited Partners' attorney, Joseph Cohen, stated: "The investors, Limited Partners are not in position financially to invest or contribute any additional funds to the partnership at this time because of the uncertainty in the economy and the lack of a prospective purchaser at the present time for the partnership assets, and because of that they will not be making any additional contributions to the partnership." **Note: No claims of any wrongdoing by Bruce B. Schwager were made as a reason for stopping contributions.** This case turned on the alleged secret amendment to the lease, an issue that was thoroughly litigated in Case #86-07376, a trial held in July of 1986 which included the rights of TCB on this issue. (S.F. Hearing July 14, 1986 Testimony of Steve Smith, pp. 70-73). These four pages of testimony only pertained to the changes in the lease. *See also* statements made by Judge O'Brien "P-6" this document. Once the jury determined that Schwager committed wrong (breached contract and fiduciary duty) in January 1986 (Jury Issue #22 Tr. 1243), anything that happened after that point would be ruled against Schwager. Breach of contract and breach of fiduciary duty were the grounds for the requested dissolution of the Partnership by the Limiteds in the 1986 case. (Appendix "P"). The court stated in the judgment in Case #86-07376 (Appendix "W") the following: "A jury trial having been waived and all issues of fact and law having been submitted to the court and the court having considered the evidence: issues the following judgment: 1. It is ordered that the request of Defendants for a dissolution of B.B.M.M., Ltd. is denied."

The judgment against "Schwagers" was the direct result of the violation of law allowed by the trial court judge and is void for lack of jurisdiction. The following are the errors committed by the trial judge, Don Wittig.

1. Trial judge erred by consolidating Case #86-07376 with Case #87-14551 and retrying Case #86-07376.
2. Trial judge erred by holding a materially unfair trial.
3. Trial judge erred by allowing jury issue on fraudulent inducement.
4. Trial judge erred by refusing to submit jury issues on good faith, wrongful acceleration, forgery, conspiracy, breach of contract. (Jury could only conclude Bruce Schwager was lying).
5. Trial judge erred by denying that, as a matter of law, TCB had committed usury.
6. Trial judge erred by refusing to admit documentary evidence of fraud and conspiracy. Perjury was thus committed.
7. Trial judge erred by allowing a "Judge" to testify for TCB and Limiteds while refusing to allow a "Judge" to testify for Schwagers.
8. Trial judge held impermissible bias and prejudice.
9. Trial judge entered improper judgment.
10. Trial judge erred by denying Schwager's constitutional right to jury trial on contempt.
11. Trial judge erred by denying Schwager's directed verdict on no evidence and insufficient evidence.
12. Trial judge erred by ruling that Bruce B. Schwager was guilty of conversion.

Note: The above Points were contained in Appellants' Opening Brief 6/17/91 filed in the 1st Court of Appeals.

The Texas Supreme Court had an inescapable duty to make an independent evaluation of Petitioners' Application for Writ of

Error. Encompassed in this evaluation is a review of the entire record which includes the Petitioners' Application for Writ of Error and Petitioners' Reply Brief. "It is mandatory that the Court review the pleadings and evidence in determining the finality of the judgment." *Ferguson v. Ferguson*, 338 S.W.2d 945, 947 (Tex. 1960). *See also Gentry v. Credit Plan Corporation of Houston*, 528 S.W.2d 571, 576 (Tex. 1975).

It is evident from the initial ruling made by the Texas Supreme Court that it did not fulfill its mandate but just paraphrased **BAKER & BOTTS'** opinion made on page 44 of its Response Brief filed 7/20/92 which states the following:

"Therefore this Application for Writ of Error presents no important legal issue that deserves the consideration of this Court." Why did "TCB" expend in excess of $1,000,000 in attorneys' fees if this statement was true? (Motion for Sanctions and Gag Order 1st Court of Appeals 8-22-91). Clearly, this case is important to the citizens of Texas and "Petitioners." All persons should be equally entitled to pursue their happiness and acquire *property* and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and *protection of property* redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuit by others under like circumstances; that no greater burden should be laid upon one than are laid upon others. *Barber v. Connolly*, 5 S. Ct. 357 (1885).

When the **"BANK"** in *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477 (Tex. 1988), complained about the rulings of district and appeals courts that the appointment of a receiver gave the trial court continuing jurisdiction over a case in which a judgment was rendered after a conventional trial on the merits. **THE TEXAS SUPREME COURT RULED THAT THE JUDGMENT WAS FINAL AND THE TRIAL COURT DID NOT HAVE JURISDICTION.**

HOWEVER, WHEN PRIVATE CITIZENS OF THE STATE DEMAND EQUAL PROTECTION UNDER THE SAME LAW, THEY ARE DENIED THEIR CONSTITUTIONAL RIGHTS. Tex. Const. art. I § 3. U.S. Const. amend. 14.

The **SANCTITY OF FINAL JUDGMENTS IS TO BE PRESERVED, NOT PERVERTED.** *Matthews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990).

In order to properly address the disagreement with the Texas Supreme Court on the nature of the case, the following quote from TRAP 133(a) is made: "In all cases where the Supreme Court is not satisfied that the opinion of the Court of Appeals in all respects has correctly declared law, but is of the opinion that the application presents no error which requires reversal, or which is of such importance to the jurisprudence of the state as to require correction, the Court will deny the application with the notation "Writ Denied."

It is incredible that the Texas Supreme Court did not perceive the following issues as important.

1. Jurisdiction
2. Fundamental Error
3. Sanctity of Final Judgment
4. Due Process - (Bette Schwager denied her right to prosecute her personal claims)
5. Jury Issues
6. Right to Have Appeal Reviewed for Merit
7. Res Judicata - (Bruce Schwager tried twice for breach of fiduciary duty)

   The Latin phrase "res judicata means that the matter has been adjudged; a thing judicially determined; or a matter settled by judgment. **THE PRINCIPLE OF RES JUDICATA IS AN OLD ONE FOUNDED UPON PUBLIC POLICY.** *Abbott Laboratories v. Gravis*, 470 S.W.2d 639 (Tex. 1971).

   Under res judicata a final judgment on the merits bans further claims by parties or their privets on the same cause of action. *United States v. Mendoza*, 104 S. Ct. 568, 571 (1984).

8. Enforcement of Final Judgment

9. Receiverships - (No receivership appointment can now be made without making judgment interlocutory)

10. Right to Present Case First - Tex. R. Civ. P. 266 (1st Court of Appeals did not rule on this issue as presented by Petitioners. Supreme Court has also failed to rule on this issue)

The Texas Supreme Court was shown in *Tarango v. Liberty Mut. Fire Ins. Co.*, 823 S.W.2d 717, 718 (Tex. App.—El Paso 1992), different appeals courts disagree with the interpretation of the ruling "Writ Denied." Also, this case shows that if the appeals court feels that the matter "is of such importance to the jurisprudence of the state, that we interpret the Supreme Court's refusal to grant a writ in that case to be *tacit pronouncement* that the general rule will apply." (Emphasis added). The conflict of opinion between appeals courts, 32 STL 131-135 South Texas Law Review, and the conflict between Supreme Court rulings require this Court to issue a detailed opinion. *See also Beard v. Graft*, 801 S.W.2d 158, 173 (Tex. App.—San Antonio 1990).

Thus, utter chaos will follow in Texas in relation to cases involving issues on receiverships, res judicata, final judgment, etc. was shown in Petitioners' Application for Writ of Error, filed in the Texas Supreme Court.

To further compound the problem, the Texas Supreme Court stated in *Mathews Const. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990), that "[i]n any event our denial of the writ is **NO INDICATION** that this court approved the opinion of the court of appeals. *See* Tex. R. App. P. 133(a)." The preceding statement irrefutably demonstrates that the Texas Supreme Court does not want to be associated with the appeals court ruling. However, the importance of the issues of this case makes this attitude irrational. The language used in *Mathews*, 796 S.W.2d at 694, is much stronger than that of Tex. R. App. Proc. 133(a).

The refusal of the Texas Supreme Court to abide by its previous ruling has made a **MOCKERY OF STARE DECISIS** (to

abide by or adhere to decided cases. Black's Law Dictionary, 5th Edition, page 1261).[2]

REASONS FOR GRANTING THE WRIT

1. **Petitioners were denied their right to Due Process and Equal Protection of the law and access to the Court as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13 and 19 due to the method of electing judges along with the unlimited campaign contributions allowed. The Texas Election Code Section 251.003 is unconstitutional. The hundreds of thousands of dollars in campaign contributions made by attorneys for Baker & Botts, Respondent's law firm, to the trial judge Don Wittig, the 1st Court of Appeals Judge Murray Cohen and successful candidates to the Texas Supreme Court constituted a lack of access to the court and an obstruction of justice.**

Campaign contributions are legalized bribery. (Appendix "A, A-2").

The issues of denial of due process and equal protection under the law are included due to Judge Don Wittig, 125th District Court, Judge Murray Cohen, 1st Court of Appeals and the Texas Supreme Court Justices' failure to disqualify themselves due to conflicts are grounds for such a petition on United States constitutional grounds enumerated herein.

The bias and prejudice of Judge Wittig, Judge Cohen and the Texas Supreme Court and lack of access to a meaningful hearing on their complaints violated Petitioners' due process rights under

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[2]Doctrine of stare decisis imposes a severe burden on the litigant who asks the supreme court to disavow one of its precedents, for that doctrine not only plays an important rule in orderly adjudication, but also serves the broader societal interests in evenhanded consistent and predictable application of legal rules. (Per Mr. Justice Stevens with three Justices joining and three justices concurring in the judgment). *Thomas v. Washington Gas Light Co.*, 100 S. Ct. 2647, 2648, 2658 (1980).

the Fifth and Fourteenth Amendments to the U.S. Constitution for the courts to provide a fair and impartial tribunal.

Petitioners were denied the due process of the laws by the failure of trial court judge Don Wittig to recuse himself due to his bias and prejudice. Texas Court of Appeals Judge Murray Cohen failed to disclose his personal friendship with a party, Harvey Resnick, and disqualify himself or reject assignment when offered. Petitioner is asserting that once the State of Texas provides a process for the judicial review of litigation, which will result in deprivation of property, due process demands that the decision makers be fair and impartial. *Id.* The very notion of "hearing" under the Fourteenth Amendment assumes that the decision maker will listen to arguments of both sides before making decisions. *See Billington v. Undernood*, 613 F.2d 91 (CA 5 Ga. 1980).

Surely our constitutional safeguard against the deprivation of property without due process is violated when a reviewing judge may be allowed to have an interest in one of the parties before him and make no effort to disclose the interest or disqualify himself. Further, the large campaign contributions to the members of the Texas Supreme Court and Judge Wittig and Judge Cohen should have disqualified these judges from this case. How is the fundamental right to a fair and impartial tribunal served by turning our backs to the implication of these facts? There can be no dispute that the state of the facts here leaves a "taste" of impropriety.

Petitioners believe that they have and will show herein that the judges involved in this case have not given the Petitioner their constitutional rights of due process and equal protection of the law as required by the 5th and 14th Amendments to the U.S. Constitution. Petitioners' due process rights have been dismissed by the Texas Supreme Court with two words, "Writ denied." The Texas Chief Supreme Court Judge Phillips adheres to Petitioners' argument as shown in his newspaper article (Appendix "Z") in which, among other things, he demands a change to the method of putting judges on the bench. In an article, "Special interests donate most to justices, study finds," from the *Dallas Morning News*, Wednesday, Sept. 2, 1992, page 5, the Chief Justice of the Texas Supreme Court was quoted as saying: "The way these judicial races

are funded is a problem and certainly a problem of appearance and I agree with that." Tom Smith, director of Public Citizens Texas Office went on to say, "It doesn't take a rocket scientist to figure out what is going on here—and, if campaign contributions don't influence decisions some of the smarter lawyers in the state are wasting lots of money!" Also attorney David Bragg of the Texas Consumer Association stated "If we had the power to indict, we would indict the system. The system is wrong, the system is bad. The Texas Supreme Court judges who took large campaign contributions from Baker & Botts law firm and Texas Commerce Bank should have gone on the record and disqualified themselves from sitting on this case. A reasonable mind would assume that the large campaign contributions have been made to influence the Justices of the Supreme Court, which obstructs justice and denies a whole class of citizens open access to the court.

Any law antagonistic to the Constitution cannot stand and if challenged will be declared invalid. It does not lie within the power of the legislature to enact laws in conflict with the Constitution. This Texas Election Code 251.003 is thus unconstitutional.

Appendices "A," "I," "J," "K" and "Z" clearly demonstrate the unconstitutionality of the Texas Election Code. Even the Chief Justice of the Texas Supreme Court Tom Phillips in his article (Appendix "Z") agrees that unlimited campaign contributions and the way we elect judges in Texas is wrong. As shown in Appendix "I," the only way the law is going to be changed is by action of the federal Court.

It is believed that the Federal Constitution requires that the Texas Supreme Court be ordered to remand this case to the Texas Court of Appeals for reconsideration by a new panel of judges who have no secret agenda in form of any of the parties and/or attorneys to this cause of action. In the alternative, dismiss judgment against the Schwagers as the method of putting judges on the bench in Texas is unconstitutional.

> Over the past few years, there has been a great deal of publicity over judicial campaign finance in Texas. Reformers within Texas and the media have criticized judicial campaign finance and have issued calls for changes in the

> way judges are selected. Former Chief Justice John Hill, for example, has been the leading advocate of merit selection of judges in Texas. He has argued that one reason Texas should adopt merit selection is to reduce the appearance of impropriety associated with large campaign contributions and the solicitation of campaign funds from lawyers who practice in Texas courts.[3] Those concerns have been echoed by the media in articles in major news magazines, newspapers, and in a "60 Minutes" television broadcast. Academic research has also explored Texas judicial finance, primarily as an illustration of a state with serious problems in its system of judicial campaign funding.[4]

Anthony Champagne, *Campaign Contributions in Texas Supreme Court Races*, 17 Crime, Law & Social Change 91, 91 (1992).

One of the most fundamentally protected concepts of due process is the right of a litigant to present his case before a fair and impartial tribunal. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S. Ct. 279, 49 L. Ed. 2d 683 (1976); *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975); *Peters v. Kiff*, 407 U.S. 493, 92 S. Ct. 1778, 29 L. Ed. 2d 83 (1972); *Johnson v. Mississippi*, 403 U.S. 212, 91 S. Ct. 1778, 29 L. Ed. 2d 423 (1971); *Strong v. Pontiac Gen. Hosp.*, 419 Mich. 872, 347 N.W.2d 696 (1982); *Crampton v. Dep't of State*, 395 Mich. 347, 235 N.W.2d 352 (1975); *Murray v. Milner*, 118 Mich. App. 352, 325 N.W.2d 422 (1982), *rev'd*, 419 Mich. 872, 348 N.W.2d 6; U.S. Const. amends. 5, 14.

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[3]For example, see generally, Hill, "The Texas Plan: Merit Selection of Judges" in Committee of 100, *The Texas Plan: Merit Selection of Judges* (1986); see also, Jackson & Riddesperger, "Money and Politics in Judicial Elections: The 1988 Election of the Chief Justice of the Texas Supreme Court", 74 *Judicature* 184 (1991).

[4]Banner, "Disqualifying Elected Judges from Cases Involving Campaign Contributors", 40 *Stanford Law Review* 449 especially at 449-51 (1988); Schotland, "Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy", 2 *Journal of Law and Policy* 57 (1985).

Due process demands *impartiality* on the part of those who function in judicial or quasi-judicial capacities. U.S.C.A. Const. amend. 5; *Schweiker v. McClure*, 102 S. Ct. 1665, 1670 (1982). Due process requires hearing by an *impartial tribunal*. To comport with due process, tribunals should avoid even *appearances of impropriety*. U.S.C.A. Const. amends. 5, 14; *Dirt, Inc. v. Mobile County Com'n*, 739 F.2d 1563, 1566 (1984). Campaign contributions are made with the intent of influencing the judges to whom the contributions are made. This form transcends to an individual or class of case. *Sec. Cox v. State of Louisiana*, 85 S. Ct. 476, 480 (1965). All citizens of the U.S. have the constitutional right of access to the courts. *See Bounde v. Smith*, 97 S. Ct. 1491, 1498 (1977).

2. Petitioner Bette R. Schwager was deprived of her rights and property without Due Process and Equal Protection of the law as required by the Fifth and Fourteenth Amendments to the U.S. Constitution and the Texas Constitution art. I §§ 3, 13, 14 and 19 as she was not allowed to prosecute her claims and defend herself against the taking of her property.

Fundamental requirement of due process is the opportunity to be heard; it is an opportunity which must be granted at a meaningful time in a meaningful manner. *Armstrong v. Manzo*, 85 S. Ct. 1187, 1191 (1965).

The Texas courts have returned to the middle ages on women's rights. The denial of Bette Schwager's constitutional right of due process and equal protection under the law because she is a woman is unconscionable. Due process as required by both the federal and state constitution is the law which hears before it condemns proceeds with inquiry and renders judgment only afterwards. Trial Court Judge Wittig threatened Bette Schwager with being shot when he stated the following: S.F. 1693-1694. "Deputy Buffington has informed me of some remarks coming from participants in trial. Mrs. Schwager I know this is a tremendous emotional strain on you but my bailiff is not liking some of the remarks you're making. I understand it's a lot of pressure but try not to make comments to

him. That upsets him and he has a 357 Magnum." This is an unbelievably callous remark for a trial judge to make, especially considering the circumstances.

BETTE SCHWAGER WAS NOT A PARTY TO THE LAWSUIT

The 87-14551 judgment shows its invalidity on its face as it states that Bette Schwager is a party on page 1 and assesses her damages on page 13. (Appendix "O"). The court did not have jurisdiction over Bette Schwager as it did not allow her to be a party to this lawsuit. Bette Schwager had her own cause of action against TCB and the Limited Partners and had a constitutional right of due process to be heard on her claims. TCB had to sue Bette Schwager to obtain her interest in the community property, as the community property was part of the suit. TCB knew that Bruce Schwager was married at time of loan as shown by Homestead Agreement and they were required to have her sign assignment of note. The Jow note was community property and was under the control of Bette Schwager. Appendix "N."

Bette Schwager was never served by TCB, and their pleadings (Appendix "P") do not show any causes of action against her. When there is no valid service of process against a defendant, the trial court lacks jurisdiction. *Trans-State Pavers, Inc. v. Haynes*, 808 S.W.2d 727, 728, 735 (Tex. App.—Beaumont 1991). Accordingly, the lack of jurisdiction renders the judgment void. A void judgment's nullity cannot be waived. *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App.—Dallas 1989).

Appendix "N."

Judgment of court having no jurisdiction is void. *Estin v. Estin*, 68 S. Ct. 1213, 1218 (1948).

Bette Schwager was not allowed to be a party to the lawsuit by trial judge Don Wittig. (Appendix "E"). Bette Schwager was denied her constitutional right of due process and open courts by refusing to allow her to prosecute her claims and defend herself against the taking of her property. Tex. Const. art. I §§ 13, 19. (U.S. Const. amends. 5, 14). Bette Schwager's claims were breach of good faith, breach of contract, mental anguish, salary, punitive damages and attorney fees. (Appendix "N-1").

Bette Schwager was never served by process by Respondents in this lawsuit or allowed to be a party.[5]

In its simplest formulation, due process requires an opportunity to be heard in a meaningful time and in a meaningful manner. U.S.C.A. Const. amends. 5, 14; *Patterson v. Coughlin*, 761 F.2d 886, *cert. denied*, 106 S. Ct. 879, 474 U.S. 1100, 886 L. Ed. 2d 916. What is incredible about this case is that Bette R. Schwager was denied **ANY** hearing of any kind and that the 1st Court of Appeals did not even address this point of error in their opinion (Appendix "Y"). The Texas Supreme Court ruling is even more incredible as they recognized this problem by not agreeing with the 1st Court of Appeals with the statement, "Writ Denied," but would not remand the case for a new trial.

The essence of Due Process is fundamental fairness. U.S.C.A. Const. amend. 5; *Crest v. Lane*, 745 F.2d 476, *cert. denied*, 105 S. Ct. 2146, 471 U.S. 1068, 85 L. Ed. 2d 503. The fundamental purpose of Due Process Clause is to allow aggrieved party an opportunity to present his case and to have its merits fairly judged. U.S.C.A. Const. 5, 14; *Okison v. Tolley School Dist. No. 25 Renville County State of N.D.*, 760 F.2d 864, *reversed*, 766 F.2d 378. Due Process is the right to a hearing by an impartial tribunal. *See Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). The fundamental requisite of due process of law is the opportunity to be heard and hearing must be at meaningful time and in meaningful manner. U.S.C.A. Const. amend. 14; *Goldberg v. Kelly*, 90 S. Ct. 1011, 1020 (1970). While procedural due process is flexible and variable in different situations, complete absence of ***any*** due process at all cannot be justified under the guise of flexibility. U.S.C.A. Const. amends. 5, 14; *Craig v. Carson*, 449 F. Supp. 385, 390 (1979). The absence of some form of those basic protections or procedural due process is a fatal deficiency. *North Ga. Finishing, Inc. v. Di Cheng, Inc.*, 419 U.S.

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[5]One is not bound by a judgment in personam resulting from litigation in which he is not designated as a party or to which he has not been made a party by service of process. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 89 S. Ct. 1562, 1569 (1969).

at 607, 95 S. Ct. at 722, 42 L. Ed. 2d at 757. The fundamental, indispensable protections of procedural due process are (1) a hearing (2) before an impartial decision maker, after (3) adequate notice of the reason for the deprivation with (4) an opportunity for the individual to present his case. *Mathews v. Eldridge*, 424 U.S. at 333, 96 S. Ct. at 901, 47 L. Ed. 2d at 32.

Some form of hearing is required before owner is finally deprived of a protected property interest. The decisions of this Court have emphasized time and again the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1156 (1982). Court has no power without personal jurisdiction. *Zenith Radio Corp. v. Hazeltine Research*, 89 S. Ct. 1562, 1569 (1969). Judgment entered against Bette Schwager is void for lack of jurisdiction.[6]

3. Petitioners were denied their constitutional right of Due Process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Open Courts Provision of the Texas Constitution art. I §§ 3, 13 and 19 by not being afforded a fair opportunity to obtain a meaningful appeal on the merits of the case as the court of appeals struck 43 of Appellants' 44 points of error for procedural defects.

Appendix "M" conclusively demonstrates the invalidity of the order striking points of error (Appendix "V"). The order itself establishes its own invalidity.

An appellant should be accorded a very reasonable and liberal interpretation of the rules and requirements of appellate review. *Salvaggio v. Brazos Cty. Water Control*, 598 S.W.2d 227, 229 (Tex. 1990). The U.S. Supreme Court has stated that the rules of procedure "should be interpreted to prevent the loss of the right of appeal, not to facilitate loss." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978).

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[6]Void judgment may be collaterally impeached. *Fay v. Noia*, 83 S. Ct. 822, 841 (1963).

The ruling issued on Feb. 24, 1992 did not take into consideration Appellants' Response Brief filed on Feb. 13, 1992. The complaints raised by TCB in its brief were directly answered by Appellants in their Response Brief. Many of the complaints made about the briefing rule violations of Appellants by the Appeals Court are not valid due to the content of Appellants' response brief. Local Rule 1.74(c) of the First Court of Appeals states that "supplemental briefs may be filed without leave of Court only if no new points of error are raised." Appellants did *not* raise any new points of error in their response (supplemental) brief.

The 1st Court of Appeals should have made the detailed objections which it made Feb. 24, 1992 on either 5/16/91 or 8/8/91. Clearly, Appellants believed that their brief had been approved and that a fair evaluation of their points of error would be forthcoming. The striking of 42 points out of 44 was, in effect, a violation of the spirit and intent of TRAP 83, as well as the Supreme Court ruling in *Inpetco, Inc. v. Texas American Bank*, 729 S.W.2d 300 (Tex. 1987).

Certainly a liberal construction of the rules would have precluded the Appeals Court from the action it took in striking 42 of Appellants' 44 points of error. This was in effect striking the entire brief of Petitioners, as Point of Error #1 is a fundamental error point, and #4 was not reviewed for substance.

The Rules of Civil and Appellate Procedure unquestionably show that the rules are to be construed liberally.

TRCP #1: Rules are to be given liberal construction.

TRAP 74(p): Briefing rules are to be construed liberally.

The Supreme Court of Texas has emphasized liberal construction of the briefing rules. *Pool v. Ford Motor Co.*, 715 S.W.2d 629 (Tex. 1986); *Davis v. City of San Antonio*, 752 S.W.2d 518, 521 (Tex. 1988); *Williams v. Khalaf*, 802 S.W.2d 651 (Tex. 1990); *Weaver v. Southwest National Bank*, 813 S.W.2d 481, 482 (Tex. 1991). Form should not be elevated over substance.

TRAP #83 requires that Appellants should have time to correct irregularities in their brief prior to the judgment being affirmed.

There were no specific complaints made about Appellants' brief that were not corrected prior to the Appeals Court's Order (by fax) of Feb. 24, 1992. Contrary to the Appeals Court's statement on page 2 of its Order, Appellants *never* had the opportunity to correct any specific deficiencies that may have existed as set out in the Order of Feb. 24, 1992. A Rule permitting brief to be amended or supplemented at any time is to be liberally construed. *Houston-American Finance Corporation v. Travis*, 343 S.W.2d 323, 326 (C.A. Tex.--Dallas 1960). Supplemental briefs are allowed per TRAP 74(o). The right of appeal is one provided by statute.

The last clause of Tex. R. App. P. 74(o) states:

> "Amendment or Supplementation. Briefs may be amended or supplemented at any time when justice requires upon such reasonable terms as the court may prescribe, *and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented.*" (Emphasis added).

The adequacy of the Schwagers' June 17, 1991 brief turns on several simple questions--whether briefing rules are to be construed liberally, whether an appeals court is required to review at least one S.F. reference to see if rules are complied with, whether response brief adding no new points of error is to be reviewed by an appeals court, whether appellants are entitled to re-brief when specific complaints to brief are made, or whether an appeals court can use the rules offensively to deny right to appeal.

Rule 74(f) states that "repetition or prolixity of statement or argument must be avoided." Rule 74(o) states as follows: "Briefs may be amended or supplemented at any time when justice requires under such reasonable terms as the court may prescribe and if the court shall strike or refuse to consider any part of a brief, the court shall on reasonable terms allow the same to be amended or supplemented." The briefing rules are subject to Tex. R. App. P. 74(p) which provides as follows:

> *Briefing Rules to be Construed Liberally.* The purpose of briefs being to acquaint the court with the points relied upon, the manner in which they arose, together with such argument of facts and law as will enable the court to decide the same, a substantial compliance with these rules will suffice in the interests in justice; but for a flagrant violation of this rule the court may require the case to be rebriefed.

Measured against these standards, the Schwagers' June 17, 1991 brief is not inadequate, especially when Schwagers' Response Brief is included. The Schwagers' brief is certainly not so inadequate as to warrant the severe sanction imposed by the court of appeals. Accordingly, the court of appeals erred in finding a "waiver" of the Schwagers' second, third, and fifth through 44th points of error.

Note: **PETITIONERS' (APPELLANTS') SUPPLEMENTAL BRIEF FILED FEB. 13, 1992 WAS ALSO NEVER REVIEWED BY THE FIRST COURT OF APPEALS.**

The following is a quote from the Texas Bar Journal, December 1987, p. 1207, footnote 47:

> While the due process provision of the United States Supreme Court does not guarantee a litigant a right of appeal, *McKane v. Durston*, 153 U.S. 684 (1894), the open courts provision of the Texas Constitution does. *LeCroy v. Hanlon*, 713 S.W.2d 335, 339 (Tex. 1986); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984). In order for this right of appeal to satisfy the requirements of due process, it must afford litigants a fair opportunity to obtain a meaningful appeal on the merits. *Evitts v. Lucey*, 469 U.S. 387 (1985); *Armstrong v. Manzo*, 380 U.S. 545 (1965). *See* Carlson, *Mandatory Supersedeas Bond Requirements: A Denial of Due Process Rights?*, 39 Baylor L. Rev. 29 (1987). An appeal may of course be regulated by procedural requirements. *Logan v. Zimmermann Brush Co.*, 455 U.S. 422 (1981). However, procedural limitations may not irrationally or arbitrarily impede access to the court because the right of appeal that is granted by a state must

> be kept clear of any "unreasoned distinctions." *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969). Adjudged by these standards, an argument could be made that review of some errors but not others which might require reversal, denies an effective appeal in violation of due process rights guaranteed by the Texas Constitution. Tex. Const. art. I, § 13. On the other hand, an equally persuasive argument is that the petitioner has had full appellate review before the court of appeals and duplicative review of all issues is not required.

The preceding unquestionably shows that Petitioners were denied their constitutional right to appeal. **The fact that the First Court of Appeals did not review 43 of Petitioners' 44 points of error made it mandatory for the Texas Supreme Court to remand this case to the appeals court for review of the 43 points stricken for procedural defects or remand to a district court for a new trial.** (Appendices "V" & "Y").

Once a state establishes avenues of appellate review such avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. *Williams v. Oklahoma City*, 89 S. Ct. 1818, 1819 (1969); *Rinaldi v. Yeager*, 86 S. Ct. 1497, 1500 (1966). Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. *Douglas v. People of State of California*, 83 S. Ct. 814, 815 (1963). Petitioners were entitled to a review of their case on its merits. *Logan v. Zimmerman Brush Co.*, 102 S. Ct. 1148, 1156 (1982).

4. **Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the Courts of Texas not applying the law equally to all citizens of the U.S. and the State of Texas. Petitioners were denied the benefit of the final judgment entered in their favor on Oct. 14, 1986. (Appendix "W") by 1st Court of Appeals ruling on March 12, 1992 (Appendix "Y"). Petitioners were denied their**

constitutional rights by the Texas courts assessing judgment against them without jurisdiction.

In *Leis v. Flyn*, 439 U.S. 438, 441, 99 S. Ct. 698, 700 (1979), this Court held that rights "derived from statute or legal rule" under state law are protected by the Fourteenth Amendment.

Petitioners submitted to the Texas Supreme Court an Application for Writ of Error, 5/21/92, a Reply Brief, 8/3/92 and a Motion for Rehearing, 9/24/92. These documents contained seven U.S. Supreme Court cases, 55 Texas Supreme Court cases and one Alaska Supreme Court case in support of their arguments against the action of the Texas 125th District Court and the 1st Court of Appeals. (Appendix "H"). These cases were ignored by the Texas Supreme Court.

The ruling in this case by the First Court of Appeals dramatically changed the existing law pertaining to "Jurisdiction" and "Final Judgments." In a far-reaching opinion (Appendix "Y"), the Court of Appeals determined "sua sponte" that the preceding 85 years of Texas Supreme Court rulings on Final Judgments were invalid. *See Waters-Pierce Oil Co. v. State*, 106 S.W. 326, 329 (Tex. 1907); *Citizens State Bank v. Caney Investments*, 746 S.W.2d 477, 478 (Tex. 1988). The First Court of Appeals (Justice Cohen) stated that the "Final" Judgment entered in Case #86-07376 by the sitting Judge Michael O'Brien of the 125th District Court was not a Final Judgment (Appendix "Y-5").

The Appeals Court assumed jurisdiction of this case which it did not have and committed fundamental error.

Judge O'Brien, trial judge in Case #86-07376, clearly demonstrated the finality of the judgment issued on Oct. 14, 1986 as shown in Appendix "G." The following docket entries were made by Judge O'Brien in Case #86-07376:

7-14-86 - Case Came On For Trial before Court as Set by Court Order All Parties appeared and announced ready for trial. All issues of law and fact were submitted to court.

7-22-86 Testimony concludes court hears closing arguments - matter taken under advisement

10-14-86 Final Judgment Signed

The following statements were made by Judge O'Brien at Hearing on May 26, 1987. Appendix "G."

1. The 1986 lawsuit is over and final
2. The only thing I have any continuing jurisdiction over in aid of my judgment is a receiver

List of documents showing finality of 1986 judgment is found in Appendix "F."

Judgment of court lacking jurisdiction is void. Where court of competent jurisdiction has entered final judgment on merits parties and their privies are bound not only as matter offered and received to sustain or defeat claim or demand but as to any other admissible matter which might have been offered. *Sea-Land Services, Inc. v. Gaudet*, 94 S. Ct. 806, 811 (1974). *Burnham v. Superior Court of California*, 110 S. Ct. 2105, 2109 (1990). Petitioners have complained about the lack of jurisdiction in the District, Appellate and Supreme Court of Texas. Schwagers now make this plea in the Court of Last Resort, the U.S. Supreme Court. The 1st Court of Appeals ruled that the appointment of a receiver to sell the property made the judgment interlocutory. This ruling is incorrect as shown herein. Appendix "R." Appointment of a receiver to enforce judgment does not make judgment interlocutory. 75 CJS 692 § 29. A judgment entered after a conventional trial on the merits is NOT interlocutory.

The Texas Supreme Court's refusal to issue an opinion upholding its previous rulings, as shown herein, is a serious departure from existing law and principles. 1203 Texas Bar Journal Dec. 1987.

Appendix "L" sets out in detail a litany of issues and rulings that were ignored by the courts of Texas, which denied Petitioners Due Process and Equal Protection of the law. These were forgery, conspiracy, good faith, breach of contract, mental anguish, wrongful acceleration, etc. The preceding issues were not submitted to the jury over the strenuous objections of Schwagers.

Due Process is secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the power of government unrestrained by the established principle of primal right. *Leeper v. State of Texas*, S. Ct. Rep. 462-468 (1890). Equal protection of the law does not exist if the kind of an appeal a man enjoys depends on the amount of money he has. *Douglas v. People of State of California*, 83 S. Ct. 814, 815 (1963). The Equal Protection Clause requires more of the statute than nondiscriminatory application within the class it establishes and also, imposes requirement of some rationality in the nature of class singled out. *Rinaldi v. Yeager*, 86 S. Ct. 1497, 1499 (1966).

"The court may appoint receiver as means of properly enforcing its judgment and in such proceeding validity of original cause of action cannot be questioned to frustrate or obstruct enforcement of judgment. Rev. St. 1925 arts. 1914, 2217, 7391; Const. art. 5 § 8." *Hunt Production Co. v. Burrage*, 104 S.W.2d 84, 87 (C.A. Texas—Dallas 1937). The preceding further shows the manifest injustice perpetuated on Schwagers by the courts of Texas.

Justice Cohen of the First Court of Appeals on March 12, 1992 ruled that the judgment rendered in Case #86-07376 on Oct. 14, 1986 (Appendix "W") was not final. The basis for this ruling was that a receiver was appointed. The authority being Tex. Civ. Prac. & Rem. Code Ann. § 51.014(1) (Vernon Supp. 1992). Appendix "U." This statute does not state that every order appointing a receiver is interlocutory, nor does it even imply it. Justice Cohen did not give **ANY CASE LAW TO SUPPORT HIS POSITION**, as there is none. It was the **OBLIGATION OF THE TEXAS SUPREME COURT** to deliver an **OPINION** either agreeing or disagreeing with his impression.

Petitioners pled that the Limited Partners' claims against Bruce Schwager were barred by **COLLATERAL ESTOPPEL**[7] and **RES**

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[7]"The Supreme Court and other courts have explained that res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resource and by preventing inconsistent decisions, encourage reliance on adjudication. *Allen, supra*, 449 U.S. at 94, 101 S. Ct. at 414-15" *Drum v. Nasuti*, 648 F. Supp. 888, 898 (E.D. Pa. 1986); *Allen v. McCurry*, 101 S. Ct.

JUDICATA[8] - (Appellants' Point of Error #2). These claims were wrongfully stricken by the 1st Court of Appeals Judge Murray Cohen. Appendix "V-3" and Appendix "M-1."

Even if the judgment in Case #86-07376 was not final as Justice Cohen suggests, **RES JUDICATA WOULD STILL BE APPLICABLE.** Final judgment settles not only issues actually litigated, but also any issues that could have been litigated; that judgment may have been wrong or premised on legal principle subsequently overruled does not affect application of res judicata. *Secrest v. Secrest*, 649 S.W.2d 610, 612 (Tex. 1983). Doctrine of res judicata bans re-litigation of same cause of action between same parties or their successors in interest.[9] All respondents in the action claimed res judicata and collateral estoppel. **(Appendix "P").**

Appointment of a receiver to enforce a final judgment does not affect the finality of the judgment.[10]

5. Petitioners were denied their right to Due Process and Equal Protection of the law as required by the U.S. Constitution Fifth and Fourteenth Amendments and the Texas Constitution art. I §§ 3, 13 and 19 by the courts of Texas' use of false and fraudulent facts to support their opinion along with the allowed perjury by the trial court.

The Appeals Court did not correctly state the nature of the case. The First Court of Appeals adopted the false and misleading statements made by TCB in its reply brief (filed July 29, 1991).

411, 414, 415 (1980); *also Asher v. Swenson, Warden*, 397 U.S. 436, 464 (1970).

[8]"There is little to be added to the doctrine of res judicata as developed in the case law of this Court. A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Dep't Stores, Inc. v. Moitie*, 101 S. Ct. 2424, 2428 (1981); *Brown v. Felsen*, 99 S. Ct. 2205, 2209 (1979).

[9]*Kremer v. Chemical Const. Corp.*, 102 S. Ct. 1883, 1890 (1982).

[10]District Court that has in personam jurisdiction over defendant may appoint receiver to enforce judgment. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1181, 1187 (11th Cir. 1991); *Fink v. O'Neil*, 106 U.S. 272.

Schwagers dedicated pages 1-9 of their Response Brief (Supplemental filed on Feb. 13, 1992) to point out the incorrect and misleading statements made by TCB in its opening statement of its Reply Brief. Other false and misleading statements were shown by Schwager in specific Response Points of their Brief (Feb. 13, 1992).

Additionally, Appellants set out in their Motion for En Banc Rehearing (Mar. 27, 1992) the incorrect and inconsistent statements made by the First Court of Appeals in their opinion of March 12, 1992, pages 1-5. **(For details of incorrect and inconsistent statements see Appendix "E").**

The refusal of the Supreme Court of Texas to grant to Schwagers the same relief it grants to others in similar circumstances within its jurisdiction denies Petitioners Schwagers the equal protection of the laws in violation of the Fourteenth Amendment contrary to the U.S. Supreme Court decision in *Barbier v. Connolly*, 113 U.S. 27, 31, 5 S. Ct. 357, 359 (1984) and *Truax v. Corrigan*, 257 U.S. 312, 334, 42 S. Ct. 124, 130 (1921).

The Supreme Court of Texas ignored complaints of fraud and perjury made by Petitioners in the 1st Court of Appeals (Appendices "E" & "H"), disregarded the substantive and procedural law of the state and prior controlling decisions of this Court, and dismissed the action. Nevertheless, the court obstinately refused to reconsider an order by the 1st Court of Appeals based on fraud and perjury. It also refused to recognize the district court's failure to prevent the perjured testimony used by Respondent during the trial of Nov. 1989 (Appendix "T"). The Texas Supreme Court denied Petitioners' Writ of Error without addressing either the false statements of the record or any federal constitutional questions raised by the Application for Writ of Error or the Motion for Rehearing. *See Brinkerhoff-Farris Trust & Savings Co. v. Hill*, 281 U.S. 673, 679, 50 S. Ct. 451, 453 (1930).

The use of false information to support the opinion of the 1st Court of Appeals—Judge Cohen deprived Petitioners of their constitutional right of due process. Appendix "E." The fundamental requirement of due process is the opportunity to be heard: it is an opportunity which must be granted at a meaningful time in a

meaningful manner. Armstrong v. Manzo, 85 S. Ct. 1187, 1191 (1965).

Professor Anthony D'Amato addressed judicial fraud as diabolically evil in *The Ultimate Injustice: When a Court Misstates the Facts*, 11 Cardoza Law Review 1313 (1990). He states: "If we take the most elementary interpretation of the last term justice . . . we must acknowledge that justice, in any situation, depends upon a full and fair accounting of the facts of that situation. If, instead of facts, fictions are introduced that are contrary to the facts, then any claimed *just solution* based on such fictions cannot achieve justice in the real world. The proposition is so elementary that it usually goes without saying." Professor D'Amato further states: "We should ask ourselves what kind of judiciary system this society has produced where judges can misstate the facts of a case and then proceed to apply law to those fictitious facts."

CONCLUSION

Petitioner Bruce B. Schwager swore to briefs filed in the 1st Court of Appeals and the Texas Supreme Court. It is clear that the truth in this matter is a major point of contention. Someone in this action is committing fraud and perjury and should be punished for same. Ruling against Bruce B. Schwager is inferring that he has committed perjury. Therefore, the Texas Supreme Court should have filed charges against him. This document has been verified. Appendix "Q."

A complete reading of the Texas Bar Journal article, December 1987, pages 1201-1207 would show that the Texas Supreme Court has seriously departed from existing law and principles in all aspects of the case before the Supreme Court of Texas by not reversing the judgment and dismissing the case or in the alternative remanding the case for a new trial. "Schwagers" sought appellate review of a substantial monetary judgment entered against them in error. The court of appeals failed to consider the judgment entered in Case #86-07376 as final. The trial court did not have jurisdiction to consider Cases #86-07376 and #87-14551 and retry Case #86-07376 as a consolidated case. This judgment should have been

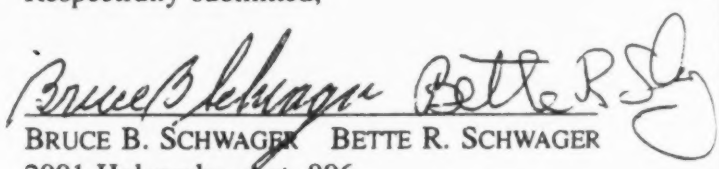
reversed and dismissed by the Texas Supreme Court. There are certain fundamental substantive rights which although not expressly defined in the Constitution or its Amendments have been given status of constitutional rights; examples of such rights are the right to travel, and freedom to choose and pursue a career. A "liberty" right under the Fifth and Fourteenth Amendments means more than freedom from personal restraints, and a "property" right is more than ownership and possession of real and personal property. Const. amends. 5, 14. "Procedural due process" means the procedure used in effecting or denying one's fundamental or constitutional rights. U.S.C.A. Amends. 5, 14. *Haag v. Cuyahogu County*, 619 F. Supp. 262, 275, 276 (D.C. Ohio 1985).

Petitioners suffered an erroneous adverse judgment and the denial of appellate review. Petitioners respectfully request this Honorable Court's intervention so that justice may be done. Meaningful appellate review should not be denied in this case. **THE IMPORTANCE OF THE ISSUES STATED IN PETITIONERS' WRIT OF CERTIORARI AND THE CONSTITUTIONAL PRINCIPLES INVOLVED REQUIRE THAT THIS COURT OVERTURN THE RULING BY THE TEXAS SUPREME COURT WHICH STATED "WRIT DENIED."** Petitioners have been raped by the legal system of Texas. "TCB," through its attorney "Baker & Botts," has gone on unbridled making "false" and misleading statements, in the First Court of Appeals and the Texas Supreme Court and probably this Court to deprive Bruce and Bette Schwager of their rights and property, including an attempt to deprive Bruce Schwager of his freedom. Based on the ruling of the Texas Supreme Court, "Baker & Botts" has been successful using the rule **THAT IF A LIE IS REPEATED ENOUGH TIMES, IT WILL BECOME THE TRUTH.**

Attorneys with Baker & Botts, a defense firm, contributed more money ($197,000) to successful Texas Supreme Court candidates than any other single group of lawyers in the state. (Appendix "X"). It should not go unnoted that the Chief Justice of the Texas Supreme Court Tom Phillips is a former member and/or partner in the Baker & Botts law firm.

It is believed that this Court should dismiss the judgment against Petitioners as they were denied their constitutional rights and the fact that the Texas Election Code Section 251.003 is unconstitutional; in the alternative, it is believed that the Federal Constitution requires that the Texas Supreme Court be ordered to remand this case to the district court for a new trial or remand this case to the Texas 1st Court of Appeals for reconsideration of the appeal on its merits. For these foregoing reasons, it is respectfully requested that this Court grant the Petition for a Writ of Certiorari. Petitioners further pray for other relief in law or in equity for which they may be entitled.

Respectfully submitted,



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